Supreme Court, U. S.
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# SUPREME COURT OF THE UNITED STATES

No. 79-467

CHIEF PADUKE DISTRIBUTING COMPANY - - - - - - - - - Petitioner

*versus*

JAMES LYNEL WILSON,
KENTUCKY WORKMEN'S COMPENSATION BOARD, and
JAMES R. YOCOM, Commissioner of Labor and Custodian of the SPECIAL FUND - Respondents

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## PETITION FOR WRIT OF CERTIORARI TO ~~THE SUPREME COURT OF KENTUCKY AND~~ THE COURT OF APPEALS OF KENTUCKY

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SUPREME COURT OF KENTUCKY
No. 79-SC-224-D

COURT OF APPEALS OF KENTUCKY
No. 78-CA-617-MR

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## PETITION

The petitioner, Chief Paduke Distributing Company, hereby petitions this Court to issue a Writ of Certiorari to the Supreme Court of Kentucky and the Court of Appeals of Kentucky for the purpose of reviewing their actions in the proceedings below, to wit:

Supreme Court of Kentucky: Order of June 26, 1979 denying discretionary review of the decision of the Court of Appeals of Kentucky, referred to below. No. 79-SC-224-D.

Court of Appeals of Kentucky: Opinion of March 2, 1979, and order of April 27, 1979 denying rehearing, and mandate issued June 28, 1979. No. 78-CA-617-MR.

All of the documents referred to above are reproduced in the Appendix hereto.

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It will be noted that some of the documents relate also to appeals by James R. Yocom, Commissioner of Labor and Custodian of the Special Fund. Separate appeals and motions for discretionary review were filed by Mr. Yocom, but they were compatible with those of the Petitioner herein, and were consolidated for purposes of hearing.

# SUPREME COURT OF THE UNITED STATES

No. _____

CHIEF PADUKE DISTRIBUTING COMPANY - *Petitioner*

*v.*

JAMES LYNEL WILSON,
KENTUCKY WORKMEN'S COMPENSATION BOARD, and
JAMES R. YOCOM, Commissioner of Labor and Custodian of the SPECIAL FUND - - - - - - *Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY AND THE COURT OF APPEALS OF KENTUCKY

### GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on the ground that if the decisions of the Supreme Court of Kentucky and the Court of Appeals of Kentucky interpretative of a State statute are valid, the statute itself is unconstitutional, in that it violates the provisions of the *Fourteenth Amendment of the Constitution of the United States.* If such decisions are not valid, they have denied to the Petitioner the equal protection of the laws, and have deprived the Petitioner of its property without due process of law, all in

contravention of said Fourteenth Amendment. It is not believed that this Court has previously rendered an opinion respecting these issues.

The dates of the decisions and orders sought to be reviewed are as follows, and it is believed that they were entered on such dates:

March 2, 1979, Opinion of Court of Appeals of Kentucky, affirming Summary Judgment of McCracken Circuit Court.

April 27, 1979, Order of Court of Appeals of Kentucky, denying rehearing.

June 26, 1979, Order of Supreme Court of Kentucky, denying discretionary review.

June 28, 1979, Mandate of Court of Appeals of Kentucky.

Jurisdiction is conferred upon this Court by *28 USC 1257(3)*.



## THE QUESTIONS PRESENTED FOR REVIEW

The proceedings below involved the application and interpretation of certain sections of the *Kentucky Workmen's Compensation Act (Chapter 342 of the Kentucky Revised Statutes)*. It is believed that the following is a fair statement of the questions that are properly raised by this Petition:

> Does a statute which requires a minimum payment of Workmen's Compensation benefits, irrespective of the inconsequential degree of disability, violate the due process guaranty of the Fourteenth Amendment?
>
> Does a court interpretation of a statute in a manner which is incompatible with its previously declared standard of disability entitlement, to the detriment of an employer, deprive the employer of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment?
>
> May a court establish a long-standing principle of law, and then refuse to apply it in the interpretation of a statute to which it is applicable, without denying the equal protection of the laws to those affected by such refusal?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED HEREIN

It is believed that the constitutional provisions and statutes quoted below are applicable in the consideration of this Petition. References to "KRS" denote sections of the Kentucky Revised Statutes.

*Constitution of the United States, Fourteenth Amendment, Section One*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of** life, liberty, or **property, without due process of law; nor deny to any person** within its jurisdiction **the equal protection of the laws.**

*Constitution of Kentucky, Section 2*

**Absolute and arbitrary power denied.**—Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

*Constitution of Kentucky, Section 3*

**Men are equal—No exclusive grant except for public services—Property not to be exempted from taxation—Grants revocable.**—All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of



public services; but no property shall be exempt from taxation except as provided in this Constitution, and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

*Constitution of Kentucky, Section 59*

**Local and special legislation.**—The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:

* * * * *

Twenty-Ninth: In all other cases where a general law can be made applicable, no special law shall be enacted.

*KRS 342.620(9)*

"Disability" means, except for purposes of KRS 342.730(1)(c) relating to scheduled losses, a decrease of wage earning capacity due to injury or loss of ability to compete to obtain the kind of work the employe is customarily able to do in the area where he lives, taking into consideration his age, occupation, education, effect upon employe's general health of continuing in the kind of work he is customarily able to do, and impairment or disfigurement. A person who has lost wages by reason of his disability, and who is otherwise eligible for compensation, is entitled to compensation during the compensable period in an amount equal to the wages lost, so long as this amount does not exceed the applicable maximum compensation. For purposes of

determining wages lost under this section, it is assumed that wage earning capacity prior to injury is the average weekly wage as calculated under KRS 342.140. An individual entitled to benefits under permanent-partial disability shall be entitled to either his lost wages due to his injury, or body functional disability benefits, whichever is greater.

*KRS 342.730(1)(a) and (b)*

**Income benefits for disability.** (1) Income benefits for disability shall be paid to the employe as follows, subject to the maximum and minimum limits specified in KRS 342.740:

(a) For total disability, 55 percent of his average weekly wage during such disability, and two and one-half per cent of his average weekly wage for each dependent up to a maximum of three.

(b) In all other cases of permanent partial disability, including any disfigurement which will impair the future usefulness or occupational opportunities of the injured employe, or employe disabled by an occupational disease, compensation shall be determined according to the percentage of disability, taking into account, among other things, any previous disability, the nature of the physical injury or disfigurement, the occupation of the injured employe and age at the time of injury or at the time the disability from an occupational disease began. The compensation paid therefor shall be 55 per cent of the average weekly earnings of the employe at the time of his injury and two and one-half per cent of his average weekly wage at the time of



injury for each dependent up to a maximum of three, subject to the limitations contained in KRS 342.740, multiplied by the percentage of disability caused by the injury or occupational disease; provided, however, the individual entitled to benefits under permanent partial disability shall be entitled to compensation based on lost wages or body functional disability benefits, whichever is greater.

*KRS 342.740(1)*

Weekly maximum and minimum income benefits for disability. (1) The minimum weekly income benefits for disability shall not be less than 20 percent (computed to the next higher multiple of $1.00) and the maximum weekly income benefit shall not exceed 60 percent (computed to the next higher multiple of $1.00) of the average weekly wage of the state as defined herein. In any event, income benefits shall not exceed the average weekly wage of the injured employe.

* * * * *

All of the statutory sections quoted hereinabove are as in effect at the time of the injury of the respondent James Lynel Wilson, January 13, 1976.

## STATEMENT OF THE CASE

This proceeding relates to a claim filed by the Respondent James Lynel Wilson under the *Kentucky Workmen's Compensation Act (Chapter 342, Kentucky Revised Statutes)*. He was an employee of the Petitioner, Chief Paduke Distributing Company. This Petition does not relate to any factual aspect, and it accepts as valid the determination of the Workmen's Compensation Board that there was a work-connected injury. **This Petition relates only to a matter of legal interpretation of a section of said Act, and to the constitutionality of such section in the event the legal interpretation of it by the Courts below should be determined to be valid.**

The Workmen's Compensation Board made an award to Wilson based upon an occupational disability of twenty percent to the body as a whole, three-fourths of which disability was determined to have preexisted the injury. The remaining one-fourth (five percent) produced weekly benefits in the sum of $3.30, payable from the cessation of a period of temporary total disability (average weekly wage, $120.00, multiplied by fifty-five percent [*KRS 342.730(1)(b)*], multiplied by five percent, the percentage of compensable disability). However, on the authority of *Apache Coal Company* v. *Fuller,* Ky., 541 S. W. 2d 933 (1976), the Board increased such weekly sum to $32.00.

The Petitioner attacked the employment of *Apache* v. *Fuller* in an appeal to the McCracken Circuit Court, alleging in its Petition of Appeal:



"6. In applying the principles of Apache v. Fuller, supra, the Board violated Section 59, Subsection 29, and Sections 2 and 3 of the Constitution of Kentucky, and also violated Section 1 of Amendment 14 of the Constitution of the United States.

"7. The decision in Apache v. Fuller, supra, is erroneous, in that in the interpretation of the Kentucky Workmen's Compensation Act it brought about an inequitable, unjust and absurd result.

"8. The decision in Apache v. Fuller, supra, is erroneous because it violated prior judicial construction which, by reason of the failure of the General Assembly to amend the Act, established vested property rights which should not have been destroyed by judicial fiat.

"9. The decision in Apache v. Fuller, supra, is erroneous, for it ignores long-standing administrative interpretation of the Kentucky Workmen's Compensation Act, which interpretation should have been considered and embodied in subsequent judicial interpretation.

"10. The decision in Apache v. Fuller, supra, is erroneous, for it is based on the provisions of KRS 342.740(1), which specify that any compensation claimant suffering from permanent partial disability shall be entitled to a minimum of 20 percent of the average weekly wage of the state as defined in said Act, which is an arbitrary classification without any rational foundation or basis, and has no relation to such critical factors as age, training, present employment, education, experience, available employment oportunities, body functional disability based upon medical findings,

actual wages, and other factors which would have a bearing on the determination of a claimant's occupational disability, and all of which said provisions are violative of the Constitution of Kentucky and the Constitution of the United States, as aforesaid."

A corresponding appeal was filed by the Respondent, James R. Yocom, Commissioner of Labor and Custodian of the Special Fund, it also raising the constitutional question. The two appeals were consolidated. The said Special Fund is a so-called "second injury fund."

On March 10, 1978 the McCracken Circuit Court entered a summary judgment in the consolidated appeals, determining that the opinion and award of the Workmen's Compensation Board was in conformity with *Apache* v. *Fuller, supra,* and affirming such award. (Appendix, page A8).

Thereafter, timely appeals were prosecuted by the Petitioner and the said Yocom to the Court of Appeals of Kentucky, and in the briefs of both of said parties the constitutional question was argued.

On March 2, 1979 the Court of Appeals of Kentucky rendered an opinion affirming the judgment of the McCracken Circuit Court. (Appendix, page A10).

Petitions for rehearing were then filed by both the Petitioner and the said Yocom, and on April 27, 1979 the said Court of Appeals of Kentucky entered an order denying the petitions for rehearing. (Appendix, page A15).



Thereafter motions for discretionary review by the Supreme Court of Kentucky were filed by the Petitioner and the said Yocom, in which motions the constitutional question was urged, but on June 26, 1979 the said Supreme Court of Kentucky entered orders denying discretionary review. (Appendix, pages A16 and A17).

On June 28, 1979 the mandates of the Court of Appeals of Kentucky were issued. (Appendix, pages A18 and A19).

It will thus be seen that **from the time of the appeal taken from the opinion and award of the Workmen's Compensation Board until the present time the Petitioner has raised in all courts the issue of the constitutionality of the statute in question, and the interpretation thereof.**

## ARGUMENT

**Does a Statute Which Requires a Minimum Payment of Workmen's Compensation Benefits, Irrespective of the Inconsequential Degree of Disability, Violate the Due Process Guaranty of the Fourteenth Amendment?**

As stated hereinabove, the Workmen's Compensation Board, relying upon the decision of the Supreme Court of Kentucky in *Apache* v. *Fuller, supra,* increased the award in favor of Wilson from $3.30 per week to $32.00 per week, **an increase of 869.69 percent,** which, on the basis of Wilson's life expectancy, **will produce a gift of over $45,000.00.**

A question immediately arises as to the constitutionality of the benefits sections of the *Kentucky Workmen's Compensation Act* [*KRS 342.730(1)(b) and 342.740(1)*], assuming that they have been properly interpreted by the Supreme Court of Kentucky in *Apache* v. *Fuller, supra.* A secondary question arises as to the constitutionality of the interpretation placed upon said statutory sections in *Apache* v. *Fuller, supra.*

*Apache* v. *Fuller, supra,* relates to minimum benefits. It was preceded by another decision interpretive of the same statutory sections as they related to maximum benefits *(C. E. Pennington Company, Inc.* v. *Winburn,* Ky., 537 S. W. 2d 167 (1976). In one of the most strained constructions of statutory language, the Supreme Court of Kentucky held (contrary to long-standing interpretation) that the maximum limitation applied in cases of partial disability, and refused to reduce that maximum in keeping with the percentage of partial disability. **Thus, an award by the Workmen's Compensation Board in the amount of $39.25 per week was regarded as within the then maximum of $81.00 per week, even though by previous interpretation the maximum would have been $16.20 per week ($81.00 multiplied by the percentage of disability, twenty percent).**



Two of the seven justices dissented, and one of them took to task the other justices for their failure to apply the English language and accepted grammatical construction.

The dissenting opinion clearly points out that an award of $16.20 per week would have been proper.

Then along came *Apache* v. *Fuller, supra,* and, following the guidelines of *Pennington* v. *Winburn, supra,* the Supreme Court of Kentucky held that the specification of the minimum benefits was applicable in cases of partial disability, and refused to apply the minimum to the percentage of disability.

The ruling in *Apache* v. *Fuller, supra,* was attacked later in *Yocom* v. *Gantley,* Ky. App., 566 S. W. 2d 176 (1978), and for the first time the constitutional aspect was treated. A majority of the Court (two judges) stated: "We cannot hold Apache unconstitutional as it was the logical interpretation of KRS 342.730(1)(b) as that statute read before amendment." However, in a strong dissent the third judge declared:

> ". . . However, I believe that there is merit in the argument that the provisions of KRS 342.740 (1) relating to the minimum weekly income benefits are unconstitutional when applied to the facts of this case.

"Gantley's average weekly wage at the time of his injury was $97.89. Gantley has since been able to obtain new employment at $135.00 per week. Consequently, the board's award is based upon a finding of probable future loss of wages. The board has, in effect, predicted that Gantley will have an average weekly wage loss of $4.89 ($97.89 x 5%). Even though the board has found that Gantley's earning capacity has been diminished by only $4.89 per week, the board has awarded Gantley benefits of $29.00 per week. This sum represents 20% of the state average weekly wage which constitutes the minimum weekly income benefit provided by KRS 343.740(1). See Apache Coal Co. v. Fuller, Ky., 541 S. W. 2d 933 (1976). Another employee with the same average weekly wage and no dependents, but with a 54% disability, would have received the same benefits as awarded Gantley ($97.89 x 55% x 54%). Gantley not only received the same weekly benefits as an employee whose disability was ten times greater, but Gantley also received $24.11 per week more than his projected weekly loss of earning power. I can find no rational basis for awarding Gantley any sum in excess of his average weekly wage multiplied by the percentage of disability determined by the board. The board's award of $29.00 per week to Gantley includes, in effect, a weekly gift of $24.11 which is completely unrelated to the injury suffered by him. To the extent that Gantley's employer and the Special Fund are compelled to make such a weekly gift to Gantley, KRS 342.740 (1) is arbitrary and in violation of section 2 of the Kentucky Constitution. See Burns v. Shephard, Ky., 264 S. W. 2d 685 (1953), and Illinois Central



Railroad Co. v. Commonwealth, 305 Ky. 632, 204 S. W. 2d 973 (1947)."

The Supreme Court of Kentucky denied discretionary review of *Yocom* v. *Gantley, supra,* and in the instant case the Court of Appeals of Kentucky viewed such denial as affirmance, which is contrary to the rules of the Supreme Court of Kentucky [*SCR 1.030 (8)(b)*]:

> "The denial of a motion for discretionary review by the Supreme Court or by the Court of Appeals shall not be taken as indicating its approval of the opinion or decision sought to be reviewed."

Nevertheless, in the instant case the Court of Appeals of Kentucky stated (Appendix, page A14): "Although the question of the constitutionality of KRS 342.740 in its application was not specifically decided in Apache, the Supreme Court by denying discretionary review in Yocom v. Gantley, supra, implicitly decided the issue. We regard Apache as a recent statement by the Supreme Court of what it has concluded the plain language of KRS 342.740(1) meant prior to the amendment of KRS 342.730(1)(b) in response to Apache, and we feel that its constitutionality has been decided in Yocom v. Gantley."

At this point in this Petition we will assume (but not admit) the validity of the rulings in *Pennington* v. *Winburn, supra, Apache* v. *Fuller, supra,* and *Yocom* v. *Gantley, supra,* and we will examine the statutory sections in question for the purpose of determining

whether or not they are, by their very provisions, violative of the constitutional sections on which we rely. In doing that, we must first establish the meaning of certain basic provisions of the *Kentucky Workmen's Compensation Act.*

Workmen's Compensation benefits are based upon **occupational disability** (as distinguish from functional disability or mere bodily impairment), which, in turn, is based upon **impairment of earning capacity.** This principle was enunciated in *Osborne* v. *Johnson,* Ky., 432 S. W. 2d 800, 802 (1968). Eight years later that principle was confirmed, the Supreme Court of Kentucky declaring that a Compensation award must still be based on a claimant's **overall capacity to earn a living** *(Couliette* v. *International Harvester Company,* Ky., 545 S. W. 2d 936, 937 [1976]).

We are thus faced with the question of whether the statutorily-created minimum benefits [*KRS 342.740 (1),* as in effect at the time of Wilson's injury (page 7 hereof)] are consistent with the principle laid down in *Osborne* v. *Johnson, supra,* and whether the statute in fact results in a violation of *Sections 2, 3 and Subsection 29 of Section 59 of the Kentucky Constitution,* and *Section 1 of the Fourteenth Amendment to the United States Constitution.*

The *Kentucky Workmen's Compensation Act* was enacted under the authority of the State's police powers. Even so, the limitation on legislative power in that respect was recognized in *Workmen's Compensation Board* v. *Abbott,* 212 Ky. 123, 278 S. W. 533, 536 (1925):



> "The right of the Legislature to declare what is a proper public policy, so as to authorize its being dealt with under the police power, seems to be limited only by the consideration that its action in the matter may not be arbitrary, but must be rested upon some tangible and reasonably clear public purpose to be served, and which has a reasonably substantial tendency to further the interest of the public welfare."

A good example of arbitrary legislation is found in *Burns* v. *Shepherd,* Ky., 264 S. W. 2d 685 (1953). There a provision of the Workmen's Compensation Act required an employer to pay one-half of a claimant's attorney fee, and the Board sought to enforce it. The statutory provision was nullified in the following language (p. 687):

> "Unless based upon some unreasonable delay or willful failure of the employer, there could be no more constitutional justification for requiring the employer to pay all or part of the employee's attorney fee than to require payment of his grocery bill. Unless some standards are provided by which the requirement would apply only to employers who have unreasonably or willfully violated some obligation which they owe to an employee, we do not think the statute can be sustained as constitutional. It violates the due process clause of the Federal Constitution and Section 2 of the Kentucky Constitution which declares that absolute and arbitrary power exists nowhere in a republic."

It is fundamental that all legislative regulations be reasonable. *Roe* v. *Commonwealth,* Ky., 405 S. W. 2d

25 (1966). Legislation granting employees the right to absent themselves from work for four hours on election day for voting purposes without deduction of wages was declared unconstitutional in *Illinois Central Railroad Company* v. *Commonwealth,* 305 Ky. 632, 204 S. W. 2d 973 (1947).

This Court has spoken firmly on the subject. For example, in *Nebbia* v. *People of State of New York,* 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934):

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, **demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.**"

In *Blodgett* v. *Holden,* 275 U. S. 142, 276 U. S. 594, 48 S. Ct. 105, 72 L. Ed. 206 (1927):

> "In Nichols v. Coolidge (May 31, 1927) [274 U. S. 531, 71 L. ed. 1184, 52 A.L.R. 1081, 47 Sup. Ct. Rep. 710] this court pointed out that a statute purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the 5th Amendment."

Again, in *Heiner* v. *Donnan,* 285 U. S. 312, 52 Sup. Ct. 358, 76 L. Ed. 772 (1932):



> "Nor is it material that the 14th Amendment was involved in the Schlesinger Case, instead of the 5th Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Coolidge v. Long, 282 U. S. 582, 596, 75 L. ed. 562, 566, 51 S. Ct. 306. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. (Cases cited)."

See also *Rudy* v. *McCloskey & Company,* 152 Pa. Super. 101, 30 A. 2d 805 (1943), and 348 Pa. 401, 35 A. 2d 250 (1944); *Willis* v. *Storey,* Ala., 105 So. 2d 128 (1958); *Rich Hill Coal Company* v. *Bashore,* 334 Pa. 449, 7 A. 2d 302 (1939).

Applying the principles enunciated above, it is clear that *KRS 342.740 (1),* as interpreted in *Apache* v. *Fuller, supra,* is an unreasonable and arbitrary legislative action. The purpose of Workmen's Compensation is to provide income benefits for injured workers **in relation to the reduction of their power to earn money.** "Its purpose was to provide recompense **commensurate with the damage from accidental injury,** as a fair exchange for relinquishing every other right of action against the employer" *(Rudy* v. *McCloskey & Company, supra).*

*KRS 342.620 (9)* (page 5 hereof) specified the factors to be considered in determining occupational disability. A reference to that section and a consideration of the cases cited hereinabove should convince the Court that **the requirement that a minimum amount be**

**paid for even a most trivial injury has absolutely no relation to the objective of the *Workmen's Compensation Act,* or to the cognizable "disability" for which Compensation is intended, or to the principle declared in *Osborne* v. *Johnson, supra.***

The instant case is a glaring example of the injustice which can be wrought by the statute, as interpreted in *Apache* v. *Fuller, supra.* A weekly benefit of $32.00, instead of the weekly sum to which the Board thought Wilson was entitled, $3.30. A prospective gift during Wilson's life expectancy of in excess of $45,000.00. The Court can recognize that even greater injustices can result.

For example, assume that an employee with two dependents sustains an occupational disability of five percent. The following calculations based on different wages will show the weekly benefit to which he would ordinarily be entitled:

$100 x 60% x 5% = $3.00
$150 x 60% x 5% = $4.50
$200 x 60% x 5% = $6.00
$300 x 60% x 5% = $9.00

In the year in which Wilson was injured, each of the specified weekly Compensation amounts ($3.00, $4.50, $6.00 and $9.00) would be increased to $32.00. **It is obvious that there is no reasonable relation between the loss of earning capacity and the resultant award.**

And consider the fact that on the basis of Wilson's average wage of $120.00, with no dependents, **Wilson**



**has been awarded as much as he would have received had he had a disability of forty-eight percent** ($120.00 x 55% x 48% = $31.68).

**And he would receive $32.00 with a one percent disability, even though he would literally be entitled to only $.66 ($120.00 x 55% x 1% = $.66).**

This all the more demonstrates that **there is no reasonable relation between the loss of earning capacity and the award that could be made in the instances cited.** It follows that the minimum compensation provisions of the *Kentucky Workmen's Compensation Act* are arbitrary, and are not validly within the regulatory grant of authority afforded by the police powers of the State. It also follows that they deprive employers of their property without due process of law, in violation of the constitutional provisions previously set forth herein.

**Does a Court Interpretation of a Statute in a Manner Which Is Incompatible With Its Previously Declared Standard of Disability Entitlement, to the Detriment of an Employer, Deprive the Employer of the Due Process of Law and Equal Protection of the Laws Guaranteed by the Fourteenth Amendment?**

The foregoing discussion has pointed out the invalidity of the minimum benefits sections of the *Kentucky Workmen's Compensation Act,* assuming that they have been correctly interpreted by *Apache* v. *Fuller, supra.* We do not believe that the provisions referred to lend themselves to such interpretation. **It is the interpretation that is wrong.**

We start out with an examination of the section of the Act which specifies the minimum weekly benefits *(KRS 342.740* [*1*], page 7 hereof). There is no doubt that the computation specified therein produced the figure of $32.00 as the minimum applicable at the time of Wilson's injury.

We must then consider the section of the Act which specifies the computation of the compensation to which Wilson was entitled, and which makes reference to the employment of the minimum prescribed in *KRS 342.740 (1),* which is *KRS 342.730 (1) (b),* page 6 hereof. Deleting from it the extraneous matter, it reads as follows:

> "In all other cases of permanent partial disability,—compensation shall be determined according to the percentage of disability, taking into account, among other things,—the nature of the physical injury,—the occupation of the injured employe and age at the time of injury—. The compensation paid therefor shall be 55 per cent of the



> average weekly earnings of the employe at the time of his injury—, subject to the limitations contained in KRS 342.740, multiplied by the percentage of disability caused by the injury—."

In keeping with these provisions, the computation of Wilson's benefits would be as follows:

> 55% multiplied by $120.00 (average weekly earnings), equals $66.00, reduced, if necessary, by the minimum limitation prescribed by KRS 342.740, $32.00, still equals $66.00, multiplied by the percentage of disability, 5%, equals $3.30.

**When the Board made its computation, it used exactly this formula,** but then resigned itself to a compulsory increase to $32.00 because of the ruling in *Apache* v. *Fuller, supra* (see paragraph 3 of the award, Appendix, page A4).

It is obvious that the interpretation of the statute by the Supreme Court of Kentucky violated accepted grammatical construction. Far worse, it violated the due process provision and the equal protection provision in both the United States Constitution and the Constitution of Kentucky, previously referred to.

The same legal reasoning applicable in the section of this Petition immediately preceding is applicable to the action of the said Supreme Court of Kentucky.

As a matter of interest, following the rendition of the decision in *Apache* v. *Fuller, supra,* the Kentucky Legislature amended *KRS 342.730,* so that it now provides that "Notwithstanding any section of KRS Chapter 342 to the contrary, there shall be no minimum weekly income benefit for permanent partial disability" *(Kentucky Acts, 1976 Extra Session, Chapter 26).*

**May a Court Establish a Long-Standing Principle of Law, and Then Refuse to Apply it in the Interpretation of a Statute to Which it is Applicable, Without Denying the Equal Protection of the Laws to Those Affected by Such Refusal?**

The equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States mandates that **judicial decisions shall be applied alike to all persons affected by those decisions.** We can show that **the Petitioner was not so privileged in the Courts below.**

ABSURD CONSTRUCTION OF STATUTES

As we have pointed out above, because of the application of *Apache* v. *Fuller, supra,* **Wilson will receive a sum to which he is not entitled by the measurement of his disability, it being in excess of $45,000.00.** This result is due to the fact that the statute on which his award was based *(KRS 342.730[1] [b])*, and the statute relating to minimum benefits *(KRS 342.740)* have been given an absurd construction.

**It is an accepted legal principle that statutes should be construed to bring about an equitable and just result.** See, for example, *Asher* v. *Stacy,* 299 Ky. 476, 185 S. W. 2d 958 (1945), which concerned an attempt to construe KRS 213.150, with respect to which there was a question as to what words were connected by the conjunction "and". In the course of the discussion the Court stated (p. 959):

> "Not the literal language but the true intention or will of the Legislature is the law. That is what the Courts endeavor to ascertain and declare and what the executive departments must obey. All rules of statutory construction have that in view. Since words are used to express an idea, if that idea is manifest, although inaptly or obscurely expressed, no usurpation is committed by declaring the legislative intent and no violence done by supplying, deleting or changing words or their arrangement in clarification. The general intent is the key to each part of an act.
>
> * * * * * * *
>
> **"As between conflicting consequences, a statute will be construed so as to make it equitable and just rather than inequitable and unjust."**



In *Baker* v. *Commonwealth,* 181 Ky. 437, 205 S. W. 399 (1918) there was the problem of construing a statute which contained an obvious error in its reenactment. The intention of the Legislature was apparent, and the Court dealt with the problem in this language (p. 401):

> "The only difference between the foregoing and section 2557b, to which it is an amendment, is that the original act provided that the bond should be required 'on the second or any subsequent conviction', instead of 'on the first conviction', etc. Hence, to ascertain of what a breach of such a bond as is in controversy may consist of, it is necessary to ascertain and determine what the Legislature, in enacting the statute, intended should be a breach of the bond. It is unnecessary to say that in construing statutes the fundamental rule is to ascertain the intention of the law-making power. **It is a well-known rule that the spirit and reason**

> **of the law wil prevail over its letter, when a literal application of the letter would lead to absurdity or injustice,** and in such instances, where the meaning is doubtful, the general terms used may be restrained by the spirit of the statute. The purpose of the Legislature in enacting the statute may be looked to, and if the precise words used are inconsistent with the object of the statute, they must give way to the intention as ascertained from the entire act."

See also *City of Louisville* v. *Helman,* Ky., 253 S. W. 2d 598 (1952); *Newbolt* v. *Board of Education,* Ky., 409 S. W. 2d 513 (1966); *George* v. *Alcoholic Beverage Control Board,* Ky., 421 S. W. 2d 569 (1967); *City of Frankfort* v. *Triplett,* Ky., 365 S. W. 2d 328 (1963); *Nolley* v. *Diamond Coal Company,* 291 Ky. 849, 165 S. W. 2d 841 (1942); *Kentucky Mountain Coal Company* v. *Witt,* Ky., 358 S. W. 2d 517 (1962); and *United States* v. *Kirby,* 74 U. S. 482, 19 L. Ed. 278 (1869).

Unquestionably, *Apache* v. *Fuller, supra,* brought about **an absurd result,** as did the decision of the Court of Appeals of Kentucky in the instant case. **It is all too obvious that the Petitioner has not been given the advantage afforded by the cases we have cited hereinabove which condemn such results. Equal protection was totally absent.**

#### PRIOR LEGAL INTERPRETATION—STARE DECISIS

There is another aspect on which the Petitioner has been denied the equal protection of the laws. For years the minimum benefits provisions of the *Kentucky*



*Workmen's Compensation Act* were construed so that the specified minimum benefits related to total disability, and they would be applied proportionately in instances of partial disability.

For example, in the case of a specified minimum of $29.00, the least amount which could be awarded for a 10% disability to the body as a whole would be $2.90. This interpretation of the statute prevailed until the time of *Apache* v. *Fuller, supra,* and, accordingly, there was no need for a change of the statute. And lacking any change, there was a vesting of property rights, and insurance premiums were fixed accordingly. The doctrine of *stare decisis* prevailed. Then came *Apache* v. *Fuller, supra,* and totally destroyed these accepted legal principles.

In *Warren* v. *Spurlock's Administrator,* 292 Ky. 668, 167 S. W. 2d 858 (1943), the Court was concerned with the construction of a statute as it related to certain insurance. It referred to a previous decision, and then stated:

> "Our construction of the statutes is predicated upon the ground that the wife was named as beneficiary in consideration of the fact that she was the insured's wife, that is, her interest was 'obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof', as stated in Section 425 of the Code. That right-whatever its nature or degree-we have consistently held to be embraced by the term 'property', as used in those statutes. **The legislature has accepted this construction for 30 years. It must be regarded as the equivalent of a**

**specific expression therein so far as contract rights acquired under it are concerned.** The policy involved in this case was issued under that interpretation and it became in effect a part of it."

An excellent dissertation on this subject is in *Brooks* v. *Clark County,* 297 Ky. 549, 180 S. W. 2d 300 (1944).

In *Ragland* v. *Shrout,* Ky., 476 S. W. 2d 820 (1972), it was said:

> "A court will not lightly overturn its previous construction of a statute of descent and distribution **where such construction has not been challenged for many years and has generally been accepted and acted upon as a rule of property.** 23 Am. Jur. 2d, Descent and Distribution, Sec. 15, p. 762."

See also *Rollins* v. *Ballantine,* 10 Ky. Opin. 139 (1878); *Smiser* v. *Inskeep,* 13 Ky. Opin. 99 (1884); *Union Light, Heat & Power Company* v. *City of Covington,* 246 Ky. 663, 55 S. W. 2d 667 (1933); *Federal Gas, Oil and Coal Company* v. *Harmon,* 254 Ky. 255, 71 S. W. 2d 630 (1934); *City of Louisville* v. *Presbyterian Orphans Home Society,* 299 Ky. 566, 186 S. W. 2d 194 (1945); and *Cave Hill Cemetery Company* v. *Gosnell,* 156 Ky. 599, 161 S. W. 980 (1913).

In the instant case **these accepted legal principles and interpretations were denied the Petitioner. He had no equal protection of the laws.**



ADMINISTRATIVE CONSTRUCTION

There is still another line of court decisions to which the Petitioner has been denied access. **For years the Workmen's Compensation Board construed the minimum benefits provisions as previously discussed, that is to say, the specified minimum related to total disability, and a partial disability would be based upon a corresponding percentage of that minimum.** The Supreme Court of Kentucky totally ignored the principle that the interpretation placed upon the statute by the Board is entitled to great respect in construing it, and *Apache* v. *Fuller, supra,* resulted.

The principle just referred to was discussed in *Barnes* v. *Anderson National Bank,* 293 Ky. 592, 169 S. W. 2d 833 (1943), as follows:

> "All rules for the interpretation and construction of statutes of doubtful meaning have been adopted and applied for the sole purpose of endeavoring to discover the legislative intent.—Some of the extraneous matters helpful to a fair interpretation of the intention of the Legislature are: legislative history, legislative construction, judicial construction, and **the administrative construction placed on the act by those intrusted to enforce its provisions."**

To the same effect is *Harned* v. *Atlas Powder Company,* 301 Ky. 517, 192 S. W. 2d 378 (1946). See also *Grantz* v. *Grauman,* Ky., 302 S. W. 2d 364 (1957) **("Practical construction of an ambiguous law by administrative officers continued without interruption for a very long period is entitled to controlling weight");**

*Allphin* v. *Joseph E. Seagram & Sons,* Ky., 294 S. W. 2d 515 (1956) ("It is well established that in construing an ambiguous statue, **the Court will give great weight to long-continued constructions and applications by authorities entrusted with its administration"**); *Brennan* v. *Owensboro-Daviess County Hospital,* 523 F. 2d 1013 (1975); *Allison* v. *United States,* 426 F. 2d 1324 (1970); and 2 Am. Jur. 2d, *Administrative Law,* §233-254.

Had the Court decisions referred immediately above been applied in the determination of the instant cause, the Petitioner would not now be before this Court today. **Failure to give the Petitioner the benefit of the reasoning in those decisions has been an effective denial of equal protection of the laws, in contravention of the Fourteenth Amendment.**

## CONCLUSION

Due process and equal protection of the laws have been totally lacking in the treatment accorded to the Petitioner in the courts below.

Justice demands that this Court take jurisdiction, and issue writs of certiorari to the Court of Appeals of Kentucky and the Supreme Court of Kentucky, in order that their decisions may be reviewed.

Respectfully submitted,

EARLE T. SHOUP
Citizens Bank Building
Paducah, Kentucky 42001
*Attorney for Petitioner*



## CERTIFICATION

I hereby certify that three copies of this petition have been served upon all parties required to be served by Rule 33 of this Court by mailing or delivering the same, first class postage prepaid in the case of mailing, as follows: McMurry and Livingston, Citizens Bank Building, Paducah, Kentucky 42001, attorneys for James Lynel Wilson; and Donald Campbell, Director, Workmen's Compensation Board, 127 Building, U. S. Highway 127 South, Frankfort, Kentucky 40601; and Cyril E. Shadowen, Assistant Counsel, Department of Labor, 801 West Jefferson Street, Louisville, Kentucky 40202, attorney for James R. Yocom, Commissioner of Labor and Custodian of the Special Fund.

EARLE T. SHOUP

# APPENDIX

# WORKMEN'S COMPENSATION BOARD

**Claim No. 1129982**

---

JAMES LYNEL WILSON - - - - - - *Plaintiff*

*v.*

CHIEF PADUKE DISTRIBUTING COMPANY and
SPECIAL FUND - - - - - - - *Defendants*

---

**OPINION AND AWARD**—Entered April 25, 1977

MESSRS. McMURRY & LIVINGSTON
713 Citizens Bank Bldg.
Paducah, Kentucky 42001
*Attorney for Plaintiff*

GEORGE R. EFFINGER
720 Citizens Bank Bldg.
Paducah, Kentucky 42001
*Attorney for Midwestern Indemnity Company*

SPECIAL FUND
Frankfort, Kentucky

EARL T. SHOUP
Citizens Bank & Trust Co. Bldg.
Paducah, Kentucky 42001
*Attorney for Grange Mutual Casualty Company*

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**OPINION BY FULL BOARD**

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## FINDINGS OF FACT

1. This case involves two claims by plaintiff for injuries to his knee allegedly sustained on January 13, 1976 and March 25, 1976. At the hearing there were stipulations as to the January 13, 1976 injury that both parties were

operating under the terms and provisions of the Act; that the defendant received due and timely notice; that the plaintiff was earning $2.50 per hour based upon a 48 hour work week; that the plaintiff was paid temporary total benefits at the rate of $75.00 per week for 3 weeks and medical expenses were paid in the amount of $229.25. No stipulations were made as to the March 25, 1976 claim of injury.

2. Plaintiff is 37 years old, married, but separated from his wife, with a 12th grade educational level. He has no dependents. Plaintiff was a route salesman for defendant with the responsibilities of driving a truck and selling beer to customers. His duties included loading and unloading of trucks, advertising and he says promotion work. On January 13, 1976 plaintiff sustained a work related injury when he slipped and fell injuring his left knee. He was treated by Dr. George Beard who treated plaintiff as an out-patient by draining fluid from his knee and fitting plaintiff with a fiberglass cast which he wore some 7 to 10 days. Plaintiff returned to work after 3 weeks with a helper on the truck to assist in the unloading and loading of the truck.

3. The Board finds that the alleged injury of March 25, 1976 was not work related and is thus non-compensable.

4. As stipulated the plaintiff earned $2.50 an hour based upon a 48 hour work week. The Board finds that the plaintiff's average weekly wage was $120.00 per week.

5. Plaintiff has suffered prior knee injuries. In 1956 he sustained a knee injury while in the Air Force and was operated for a cartilage operation in 1958. Plaintiff also sustained an injury to this knee in 1963. Plaintiff says he has had some minor discomfort from the knee all along.

6. Dr. George Beard, plaintiff's treating physician, concluded that plaintiff had an active prior disability pre-existing the injury of January 13, 1976 of some 30% to the



knee which he assigned 3 to 5 percent to the body as a whole describing it as plaintiff suffering from a moderately severe osteoarthritis. He concluded that the January 13, 1976 injury added another 10% disability to the knee or possibly a 1% additional disability to the body as a whole. Dr. Ibrahim Kahn was appointed to examine plaintiff pursuant to KRS 342.121. He concluded that plaintiff suffered a pre-existing active disability of some 5% to the body as a whole and added possibly a 1% additional disability occasioned by the injury.

7. The Board finds the plaintiff's occupational disability to be 20% under the principles set out in Osborne v. Johnson, Ky., 432 S. W. 2d 800, KRS 342.620(9) and KRS 342.730.

8. The Board is bound to follow the steps set out in Young v. Fulkerson, Ky., 463 S. W. 2d 118 in apportioning the liability in this case.

a. The injury of January 13, 1976, independently would not have caused the entire disability.

b. The extent of occupational disability attributable to the injury of January 13, 1976 alone is 2%. The employer owes this.

c. The degree of occupational disability which existed immediately prior to the subject injury without regard to their effects is 15%. This is non-compensable.

d. The remaining 3% of plaintiff's occupational disability which began January 13, 1976, is the result of the arousal of a non-disabling disease into further disabling reality. This portion falls upon the Special Fund.

9. The plaintiff received an injury of appreciable proportions in the accident of January 13, 1976, and his future earning capacity has been reduced and impaired to the extent found herein.

## RULINGS OF LAW

KRS 342.004
KRS 342.020
KRS 342.120
KRS 342.620(9)
KRS 342.730
Osborne v. Johnson, Ky., 432 S. W. 2d 800
Young v. Fulkerson, Ky., 463 S. W. 2d 118

## AWARD

IT IS ORDERED AND ADJUDGED BY THE BOARD AS FOLLOWS:

1. The plaintiff, James Lynel Wilson, shall recover of the defendant, Chief Paduke Distributing Company, and/or its insurance carrier, the sum of $66.00 per week from January 13, 1976 to February 4, 1976 for temporary total disability and beginning February 5, 1976 he shall recover the sum of $1.32 per week for 2% occupational disability for so long as he is so disabled, together with interest at the rate of 6% per annum on all due and unpaid installments of compensation, and the defendant is to take credit for any compensation heretofore paid.

2. The plaintiff, James Lynel Wilson, shall recover of the Special Fund the sum of $1.98 per week beginning February 5, 1976, for 3% occupational disability for so long as he is so disabled, together with interest at the rate of 6% per annum on all due and unpaid installments of compensation, and the defendant is to take credit for any compensation heretofore paid.

3. The award must be raised to $32.00 per week in accordance with Apache Coal Company v. Fuller, Ky., 541 S. W. 2d 933 ($11.11 against the defendant employer and $17.59 against the Special Fund).

4. All compensation awarded herein shall be paid to the plaintiff by the defendant employer subject to reimbursement by the Special Fund for the part owed by it on a quarterly basis.



5. The plaintiff shall further recover of the defendant employer for the cure and relief from the effects of the injury such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability.

DEPARTMENT OF LABOR

# WORKMEN'S COMPENSATION BOARD

Frankfort, Ky. 40601

Julian M. Carroll, Governor
James R. Yocom, Commissioner
Wm. L. Huffman, Director

Shelby T. Denton, Chairman
Glenn Schilling
George B. Simpson
Darryl T. Owens
Steve Robbins

(SEAL)

May 20, 1977

Messrs. McMurry & Livingston
Attorney at Law
713 Citizens Bank Building
Paducah, Kentucky 42001

Hon. George R. Effinger
Attorney at Law
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Hon. Earl T. Shoup
Attorney at Law
Citizens Bank & Trust Co. Building
Paducah, Kentucky 42001

Hon. Joe A. Newberg
Attorney for Special Fund
Frankfort, Kentucky 40601

RE: James Lynel Wilson v. Chief Paduke Distributing Company and Special Fund #1129982

Gentlemen:

On May 20, 1977, the Board, at a meeting of the full Board, entered the following order:



"It is ordered by the Board that defendant's petition for reconsideration, filed herein May 6, 1977, be and the same is hereby overruled.

It is further ordered by the Board that the motion for attorney fee, filed herein April 27, 1977, be and the same is passed until appeal time has expired from the date of this order."

Very truly yours,

(s) Wm. L. Huffman
Director

WLH:lf

# McCRACKEN CIRCUIT COURT

DIVISION No. I
**Board No. 1129982**

---

CHIEF PADUKE DISTRIBUTING COMPANY - - *Petitioner*

*v.* **Civil Action No. 16,516**

JAMES LYNEL WILSON, SPECIAL FUND and
WORKMEN'S COMPENSATION BOARD - - - *Respondents*

AND

JAMES R. YOCOM, Commissioner of Labor and
Custodian of the SPECIAL FUND - - - *Petitioner*

*v.* **Civil Action No. 16,496**

JAMES LYNEL WILSON,
CHIEF PADUKE DISTRIBUTING COMPANY and
WORKMEN'S COMPENSATION BOARD - - *Respondents*

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## FINDINGS OF FACT AND SUMMARY JUDGMENT

Upon motion of the respondent, James Lynel Wilson, for summary judgment in the above-captioned consolidated appeals, and a hearing having been held and all parties being represented by counsel, the Court makes the following findings of fact:

1. The Opinion and Award of the Workmen's Compensation Board rendered on April 25, 1977, is supported by the evidence in the record.

2. While the arguments of the Special Fund and Chief Paduke Distributing Company are somewhat persuasive regarding the effect of KRS 342.740, the Court finds that Statute to be decisive on the issues of the minimum amount of compensation which is payable in a permanent partial disability award.



3. The Court further finds that the Opinion and Award of the Board is in conformity with the controlling case of *Apache Coal Company* v. *Fuller,* Ky., 541 S.W. 2d 933 (1976).

## ORDER

Based upon the above findings, IT IS HEREBY ORDERED, DIRECTED AND ADJUDGED that the Board's Opinion and Award rendered on April 25, 1977, in the case of James Lynel Wilson v. Chief Paduke Distributing Company and the Special Fund, Workmen's Compensation Board No. 1129982, is hereby affirmed on appeal to this Court, with the defendants to pay the court costs of this action.

ENTERED on this the 10th day of March, 1978.

/s/ Lloyd C. Emery, II
Judge, Div. I
McCracken Circuit Court

A Copy Attest:
Alfred Obermark, Clerk
By /s/ Karen Granner, D.C.

OPINION RENDERED: MARCH 2, 1979
NOT TO BE PUBLISHED

# COURT OF APPEALS OF KENTUCKY

**No. 78-CA-617-MR**

CHIEF PADUKE DISTRIBUTING COMPANY - - *Appellant*

*Appeal From McCracken Circuit Court*
*v.* *Honorable Lloyd C. Emery II, Judge*
*Action No. 16496 & 16516*

JAMES LYNEL WILSON,
JAMES R. YOCOM, Commissioner of Labor and Custodian of the SPECIAL FUND, and
WORKMEN'S COMPENSATION BOARD - - - - *Appellees*

AND

**No. 78-CA-587-MR**

JAMES R. YOCOM, Commissioner of Labor and Custodian of the SPECIAL FUND - - - *Appellant*

*Appeal From McCracken Circuit Court*
*v.* *Honorable Lloyd C. Emery II, Judge*
*Action No. 16496 & 16516*

JAMES LYNEL WILSON,
CHIEF PADUKE DISTRIBUTING COMPANY, and
WORKMEN'S COMPENSATION BOARD - - - *Appellees*

**AFFIRMING**

BEFORE: VANCE, HOGGE and WHITE, Judges.

HOGGE, JUDGE. This is a workmen's compensation proceeding in which the Special Fund and the employer, Chief Paduke Distributing Company, have each filed an appeal from the judgment of the McCracken Circuit Court. The judgment being challenged affirmed an opinion and award of the Workmen's Compensation Board in which the claimant, James Lynel Wilson, was found eligible for benefits. Among the issues involved in the consolidated appeals are whether the Board was correct in finding twenty percent



(20%) permanent partial disability as to the body as a whole, and whether the interpretation of KRS 342.740(1) found in *Apache Coal Company* v. *Fuller*, Ky., 541 S. W. 2d 933 (1976) is constitutionally valid.

The claim filed by James Lynel Wilson alleged that his left knee was injured in two accidents on January 13, 1976 and March 25, 1976. The January accident occurred when Wilson was building a display at a supermarket and fell off the dock. The March accident occurred when he stepped into a deep hole after visiting a tavern where he encouraged the proprietor to stock his employer's brand of beverage.

After the January incident, fluid was removed from Wilson's knee and he received shots for pain. In three weeks, he returned to work, although he wore a knee brace and the knee still gave him some discomfort. He had a helper on the truck to assist him in the heavy work. After the second accident, fluid was again removed from the knee, and Wilson was given a fiber glass cast. The knee gives away periodically and he experiences pain. Wilson now walks with a brace and cane.

Wilson's left knee was first hurt in 1956 at Osan Air Base in Korea. In 1958, he had a cartilage operation on the knee. In 1963 his knee was again hurt in an auto accident in Chicago, where he was hospitalized as a result of his injuries. The knee eventually healed and in seven months Wilson was able to go back to work, although he occasionally wore an elastic support on colder days.

The Workmen's Compensation Board found Wilson to be twenty percent (20%) disabled. Fifteen percent (15%) of his disability was found to be pre-existing and therefore non-compensable. Of the remainder, two percent (2%) was found to be the result of a work-related injury of January 13, 1976, and three percent (3%) was found to be the result of the arousal of a dormant, non-disabling disease or condition. The injury of March 25, 1976 was held to be not work-related and therefore non-compensable. Wilson

was awarded $32.00 per week in benefits pursuant to the minimum benefits principle set forth in *Apache Coal Company* v. *Fuller, supra.* The opinion and award was affirmed by the Circuit Court.

The first issue before us in this case is whether the Board erred in finding that the injury of January 13, 1976 resulted in permanent partial disability to the body as a whole. The brief for Chief Paduke Distributing Company contends that whatever disability was added to Wilson's pre-existing condition resulted from the injury of March 1976, which was not work-connected.

This Court will not set aside the findings of fact of the Workmen's Compensation Board where there is substantial evidence of probative value to support those findings. *Holman Enterprise Tobacco Warehouse* v. *Carter,* Ky., 536 S. W. 2d 461 (1976); *Yocom* v. *Pierce,* Ky., 534 S. W. 2d 796 (1976). We believe there is such evidence to support the finding that the accident of January 13, 1976 resulted in partial disability. Although Wilson had periodically worn an elastic support prior to the January incident, a stronger brace was prescribed after the incident. Dr. Beard stated that after the January accident he advised Wilson that "he could not return to work as he was, but he should have someone to help him." Wilson returned to work wearing a brace, and assisted by a helper. When he returned, he was still experiencing discomfort and was taking medicine. Dr. Beard testified that the January and March accidents each added ten percent (10%) disability to the knee. In view of the evidence, in the record to support it, the finding of the Board will not be overturned.

The second issue before us is whether the Board erred in finding permanent partial disability to the body as a whole, rather than to a member. It is argued that Dr. Beard spoke initially of disability to the knee, and that furthermore that in view of the minimal additional disability which could be attributed to the 1976 injuries, there was no



reason to think in terms of disability to the body as a whole. We note that the latter part of Dr. Beard's deposition, testimony was given as to the amount of disability as to the body as a whole. We are not disturbed by the fact that the percentage of disability is low. As the Supreme Court of Kentucky stated in *Blair* v. *General Electric Company,* Ky., 565 S. W. 2d 631, 634 (1978), "The statute does not say that the degree of such loss or limitation shall be substantial or that it be reflected in an immediate reduction in pay. If the injury 'adversely affects' the workman's ability to labor' or his 'occupational opportunities,' then 'his compensation benefits shall not be limited' to the schedule." See also KRS 342.730(1)(c) 27. We believe that there is substantial evidence in the record to support the conclusion that the January injury adversely affected Wilson's ability to labor. Dr. Beard stated that he told Wilson after treating him following the January accident that he could not return to work without help. He felt that Wilson could not have continued the heavy work that he did — carrying heavy cases of beverages — on the knee. There is an inference in the record that Dr. Beard would have discouraged Wilson from trying to return to his former job in March except for the fact that he felt Wilson had no option other than labor, in view of his lack of educational background. Doctor Beard testified that the January injury resulted in disability as to the body as a whole.

The final issue before us is the validity of the minimum benefits principle as interpreted in *Apache* v. *Fuller, supra.* As recently as *Yocom* v. *Gantley,* Ky. App., 566 S. W. 2d 176 (1978), KRS 342.740(1), as interpreted in *Apache,* was challenged on the grounds it violated sections 2, 3 and 59 of the Kentucky Constitution and the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States. This court declined to hold KRS 342.740(1), as interpreted in *Apache,* unconstitutional. In addition to those arguments raised in

*Yocom* v. *Gantley*, the appellants also urge application of the principle that statutes should be construed to bring about an equitable and just result, and not an absurdity. *George* v. *Alcoholic Beverage Control Board*, Ky., 421 S. W. 2d 569 (1967). *Apache* v. *Fuller* was decided June 11, 1976. A petition for rehearing was denied November 12, 1976.

Although the question of the constitutionality of KRS 342.740 in its application was not specifically decided in *Apache*, the Supreme Court by denying discretionary review in *Yocom* v. *Gantley*, *supra*, implicitly decided the issue. We regard *Apache* as a recent statement by the Supreme Court of what it has concluded the plain language of KRS 342.740(1) meant prior to the amendment of KRS 342.730(1)(b) in response to *Apache*, and we feel that its constitutionality has been decided in *Yocom* v. *Gantley*.

The judgment is affirmed.

ALL CONCUR.

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# COURT OF APPEALS OF KENTUCKY

**No. 78-CA-617-MR**

CHIEF PADUKE DISTRIBUTING COMPANY - - *Appellant*

*Appeal From McCracken Circuit Court*
*v.* *Honorable Lloyd C. Emery II, Judge*
*Action No. 16496 & 16516*

JAMES LYNEL WILSON,
JAMES R. YOCOM, Commissioner of Labor and Custodian of the SPECIAL FUND, and
WORKMEN'S COMPENSATION BOARD - - - - *Appellees*

AND

**No. 78-CA-587-MR**

JAMES R. YOCOM, Commissioner of Labor and Custodian of the SPECIAL FUND - - - *Appellant*

*Appeal From McCracken Circuit Court*
*v.* *Honorable Lloyd C. Emery II, Judge*
*Action No. 16496 & 16516*

JAMES LYNEL WILSON,
CHIEF PADUKE DISTRIBUTING COMPANY, and
WORKMEN'S COMPENSATION BOARD - - - *Appellees*

## ORDER DENYING PETITION FOR REHEARING

BEFORE: VANCE, HOGGE and WHITE, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: April 27, 1979

/s/ John D. White
Judge, Court of Appeals

# SUPREME COURT OF KENTUCKY

**79-SC-224-D**
**(78-CA-617-MR)**

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CHIEF PADUKE DISTRIBUTING COMPANY - - - *Movant*

*v.*

JAMES LYNEL WILSON,
JAMES R. YOCOM, ETC., ET AL. - - - - *Respondents*

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*McCracken Circuit Court*
*16496 and 16516*

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## ORDER DENYING DISCRETIONARY REVIEW

The motion of Chief Paduke Distributing Company for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED June 26, 1979.

/s/ John S. Palmore
Chief Justice



# SUPREME COURT OF KENTUCKY

**79-SC-235-D**
**(78-CA-587-MR)**

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JAMES R. YOCOM, Commissioner of Labor and
Custodian of the SPECIAL FUND - - - - - *Movant*

*v.*

JAMES LYNEL WILSON, ET AL. - - - - *Respondents*

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*McCracken Circuit Court*
*16496 and 16516*

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## ORDER DENYING DISCRETIONARY REVIEW

The motion of James R. Yocom, Commissioner of Labor and Custodian of the Special Fund, for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED June 26, 1979.

/s/ John S. Palmore
Chief Justice

OPINION RENDERED: MARCH 2, 1979

# COURT OF APPEALS OF KENTUCKY

CHIEF PADUKE DISTRIBUTING COMPANY

v.

JAMES LYNEL WILSON,
JAMES R. YOCOM, Commissioner, ETC.,
ET AL. - - - - - - -

File No.
78-CA-617-MR

**MANDATE**—Issued June 28, 1979

The opinion rendered on the above date, a copy of which is attached hereto and made a part hereof, is now final. It appearing that there is no error in the judgment of the Circuit Court, it is therefore the mandate of this Court that said judgment is hereby AFFIRMED.

APRIL 27, 1979—Appellee & Appellant's Petition for Rehearing Denied.

JUNE 26, 1979—Movant's Motion for Discretionary Review by Supreme Court Denied.

A Copy - Attest:

(SEAL)

Issued: June 28, 1979

/s/ John C. Scott, Clerk



OPINION RENDERED: MARCH 2, 1979

# COURT OF APPEALS OF KENTUCKY

JAMES R. YOCOM, Commissioner of Labor and Custodian of SPECIAL FUND - - - - - - -

*v.*

JAMES LYNEL WILSON,
CHIEF PADUKE DISTRIBUTING COMPANY,
ET AL. - - - - - - -

File No.
78-CA-587-MR

**MANDATE**—Issued June 28, 1979

The opinion rendered on the above date, a copy of which is attached hereto and made a part hereof, is now final. It appearing that there is no error in the judgment of the Circuit Court, it is therefore the mandate of this Court that said judgment is hereby AFFIRMED.

APRIL 27, 1979—Appellant's Petition for Rehearing Denied.

JUNE 26, 1979—Movant's Motion for Discretionary Review by Supreme Court Denied.

A Copy - Attest:

(SEAL)

Issued: June 28, 1979

/s/ John C. Scott, Clerk